I would observe that the two cases apply to an order for payment by instalments only without any provision for default. It seems to me that under the existing provisions of law where the court makes such an order, if there is a default in payment the judgment creditor may issue a notice calling upon the judgment-debtor to attend before the court and show cause why he should not be committed to prison for the default (see section 4(7) of the Debtors Ordinance, 1957); or he may sue out for a writ of seizure and sale for those instalments in arrears. Order 47 Rule 17(a) on its proper construction clearly allows this. *Woodham Smith* v. *Edwards*,[3] referred to by Horne J. in *Ahna Moona's* case, *supra*, appears to establish the principle that where an order has been made for payment of a judgment debt by instalments, execution may issue for the amount of instalments which have become due and are unpaid.

In the present application I need only concern myself with what is intended by the order of court when the judgment by consent was entered. The parties agreed that the judgment debt was to be paid by 15 monthly instalments, each instalment by the first of every month, commencing on 1st April, 1974, and "in the event of the defendants failing to pay any one monthly instalment in the manner .... ordered, the whole of the balance then remaining unpaid shall immediately become due and payable". From the very wording, the intention is very clear and it is this: the failure by the defendants to pay any instalment by the date ordered makes the whole balance payable. In effect this means the order to pay by instalments is vacated and the judgment-creditor, i.e. the plaintiff, is entitled to issue forthwith a writ of seizure and sale, unless, of course, the whole balance is paid.

The application is dismissed with costs.

Application dismissed.

Solicitors: *L. M. Ong & Co.; Ng Kong Yeam.*

AMANULLAH BIN HAJI ALI HASAN v. HAJJAH JAMILAH BINTI SHEIK MADAR

[O.C.J. (Syed Othman J.) August 27, 1974]
[Johore Bahru — Probate No. 1 of 1973]

Muslim Law — Will — Validity of — Will made when testator was in a coma during illness — Disposal of more than one-third of deceased's property — Legacy to heir — Wills Ordinance, 1959.

The plaintiff claimed as sole executor and trustee named in the will dated February 24, 1968 of his father, Haji Ali Hasan bin Zulfran, who died on February 27, 1968 to have the will established; or alternatively he claimed to be entitled to one-third share of all property of the deceased named in the will under Muslim Law. Under that will the plaintiff was given the whole of the estate of the deceased. The defendant contended that the will was invalid as it was executed when the deceased was not of sound mind, memory and understanding and that the plaintiff was only entitled to his share in accordance with the Muslim Law of inheritance. She also counterclaimed for probate of the will of the deceased dated May 7, 1961, which named the plaintiff and the defendant as executors and trustees and directed them to distribute the estate according to Muslim Law.

Held: (1) on the evidence the 1968 will was made by the deceased when he was in a coma during an illness and therefore it was not validly made;

(2) even if it was validly made it would be void because it purported to dispose of more than one-third of the estate and because it purported to benefit one of the testators' heirs;

(3) there was no dispute that the testator made the 1961 will and as it did not contravene the Muslim law, it should be admitted to probate.

Cases referred to:-

(1) *Shaik Abdul Latif* v. *Shaik Elias Bux* (1915) 1 F.M.S.L.R. 204.

(2) *Siti* v. *Mohamad Nor* (1928) 6 F.M.S.L.R. 135.

PROBATE SUIT.

C. H. Lim (*Hooi Sook Heng* with him) for the plaintiff.

Abdullah bin Abdul Rahman (*Lee Lin Jin* with him) for the defendant.

Syed Othman J.: The plaintiff claims as sole executor and trustee named in the will dated 24th February, 1968 (1968 will) of his father Haji Ali Hasan bin Zulfran (deceased), who died on 27th February, 1968 to have the will established; alternatively he claims he is entitled to one third share of all property named in the will under Muslim Law.

The defendant contends that the will is invalid on the ground that when it was executed the deceased was not of sound mind, memory and understanding and that the plaintiff is only entitled to his share in accordance with the Muslim Law of distribution. She counterclaims pronouncement against the 1968 will and for the will of the deceased dated 7th May, 1961 (1961 will).

The plaintiff in reply says that at the time of execution of the 1961 will the deceased did not know and approve of its contents, and alternatively the 1961 will had been revoked by the 1968 will.

The case for the plaintiff is briefly as follows. On 24th February, 1968 the deceased was ill in the General Hospital, Johore Bahru. Close relatives and the defendant were in the room where the deceased was warded. The deceased was weak. He asked the plaintiff to get a lawyer. He went out and fetched Encik Sim Teow Geok who lived near his house. The two came back to hospital. The deceased gave instructions to prepare a will. They went back to Encik Sim's house. Encik Sim prepared a will. Then the plaintiff got Encik Wan Hashim, a family friend, to come along and be a witness. They all went to the hospital. It was 9.00 p.m. All members of the family were in the deceased's room. Encik Sim spoke to the deceased and read out the draft will to him in English. He did not say much. Since the deceased's hand was paralysed Encik Sim with the assistance of Abdul Rashid, a brother of the plaintiff, (DW4), got the deceased to put his right thumb impression on the will. Encik Wan Hashim read to the gathering his translation of the will. Then both Encik Sim and Encik Wan Hashim signed as witnesses.

The defence story is briefly as follows. The deceased was first admitted into the hospital on 13th February, 1968. According to Datuk Dr. Lim Kee Jin, who supervised treatment and who knew the family, the deceased suffered from a stroke on the right side; he was also a chronic diabetic; he was

unconscious when he was in hospital from 13th to 18th February although he seemed to be able to respond to questions; on 18th February he was discharged at the request of the family. He was again admitted on 24th February, 1968. This time he was in coma and aphasic. Datuk Lim is of the opinion that the deceased could not have responded to questions on 24th February, 1968. The other defence witness the defendant herself (DW2) and Abdul Rashid (DW4) also say that the deceased was unconscious when the will was made. DW2 says that deceased got the stroke at the house on 13th February, 1968. From that time till his death he could not speak, and on the second admission to hospital, he was critically ill. He could not move his limbs. Abdul Rashid, DW4, says that he returned from abroad on hearing of his father's illness on 21st February, 1968; that he could not get any response from the deceased when he talked to him; and that he assisted in getting the deceased's thumb print impression on the will at the request of the plaintiff who had told him that since the deceased had not made a will it was necessary that there should be a will.

By the 1968 will, the deceased revoked all former wills and codicils and declares it to be his last will, he appoints plaintiff to be the sole executor and trustee and devises all his estate, real and personal, to the plaintiff.

By the 1961 will, the deceased revoked all former wills and declares it to be his last will, appoints the defendant and the plaintiff to be the executors and trustees, directs the trustees to distribute his property according to Islamic Law, appoints the defendant only to be the guardian of the person and property of his minor sons and in the event of death of the defendant, appoints Haji Annuar bin Haji Abdul Malik to be the guardian and other trustee with the plaintiff of the will.

The plaintiff's side in adducing evidence does not appear to dispute that the deceased was paralysed when the 1968 will was executed and mainly seeks to show by the evidence of the plaintiff and the lawyer, Encik Sim, that in spite of the paralysis, the deceased was conscious and could speak and convey what he wanted to be done intelligently. But I find Encik Wan Hashim in his evidence does not support them.

Encik Wan Hashim says that when Encik Sim read out the will, he did not hear the deceased speaking. Later he says, "when I saw deceased he was lying in bed. I think he was conscious. His eyes were open. He was mumbling". But in cross-examination he says "I was reading it to him and to all persons in the room. I was partly looking at him and partly at the will. Deceased was looking up. He was not looking at me. I did not see any nod. But I saw his lips were moving but no words came out." On being questioned by the court he says he went there to accommodate the plaintiff. Now Encik Wan Hashim on his own evidence knew deceased well and for a long time. They worked together at one time in the Public Works Department. If in fact the deceased could have talked, as the plaintiff and Encik Sim claim, in ordinary course of human conduct considering the past relationship of Encik Wan Hashim and the deceased they would have talked to each other. Yet Encik Wan Hashim gives no evidence that he talked to the deceased, or that the deceased talked to him, or even asked him to be a witness to the will he was making. All the indications are that Encik Wan Hashim knew that the deceased was unconscious and could not talk. Encik Wan Hashim's evidence clearly contradicts the evidence of the plaintiff and Encik Sim.

Apart from this, in view of the evidence that the deceased was gravely ill at the time, I feel that the plaintiff's side should have called the doctor who treated the deceased to show that the deceased was in fit mental condition to make the will. Failure to adduce this evidence in the circumstances of this case should, I think attract adverse inference against the plaintiff's case.

The evidence of the defence, both medical and factual, I find convincingly shows that the deceased was totally unconscious from the time he was admitted on the 24th February, 1968 to the time of his death on 27th February, 1968. From the surrounding circumstances I do not see how on the very evening, when the 1968 will was said to have been made, the deceased could have been conscious. I reject the evidence of the plaintiff and Encik Sim that the deceased could talk. I find that they are not witnesses of truth in this respect.

Considering the evidence that the deceased was a religious person knowledgeable in Muslim Law I am satisfied if he had been possessed of his faculties he would not have made the will. He would have known that it was contrary to Muslim morals and religion for any Muslim to make a will disposing of all property to the benefit of only one person or beneficiary and cutting off other beneficiaries entirely from any share. I entirely reject the plaintiff's evidence that the deceased had spoken to him before the deceased's death that the deceased wanted to devise all his property to the plaintiff so that the plaintiff could look after a widowed daughter of the deceased and her children. Even on plaintiff's own evidence it cannot be said that the plaintiff has in fact been looking after the widow. The evidence also shows that the deceased had during his lifetime distributed property to his children including the plaintiff and the widowed daughter. If in fact the deceased wanted to make extra provision for the daughter I can see no reason why the deceased could not have done it by giving it direct to her during his lifetime instead of by devising it to the plaintiff.

Even if the 1968 will was validly made, it would be void because it would offend these two principles of Muslim Law:

(1) A testamentary disposition is invalid if it purports to dispose of more than a third of the estate. *Dr. Ahmad Ibrahim* in "Islamic Law in Malaya" at pages 267 and 268 says:

"In the Malay States the rule of Muslim Law under which a man has the power to dispose by will of not more than one-third of his property belonging to him at the time of death, is followed. (*Shaik Abdul Latif* v. *Shaik Elias Bux*[1])."

See also *Minhaj et Talibin* page 260 section 2 and section 669 and *Tyabji* on Muslim Law 4th edition page 758.

(2) A testamentary disposition is invalid if it purports to benefit any of the testator's heirs. Muslim Law appears to prohibit a Muslim from disposing of his estate by will so that a beneficiary gets more than his share as prescribed by the law of distribution. See section 669(b) *Tyabji* on Muslim Law at page 759. *Dr. Ahmad Ibrahim* in "Islamic Law in Malaya" at page 268 says:

"The will of a Muslim which attempts to prefer an heir by giving him a bigger share of the estate than he is entitled to by Muslim Law is wholly invalid as to such bequest without the consent of the other heirs (*Siti* v. *Mohamed Nor*[2])."

Encik Lim, for the plaintiff, has urged that the silence of the relatives after Encik Wan Hashim had read out the will should be taken as consent by the beneficiaries to the disposition of the property under the 1968 will. To my mind, in Muslim Law, before the court can accept that an heir consents to a will where required, it must be shown that the will was validly made and that the heir declares his approval to the disposition; and if the will is invalid the question of consent does not arise. The effect of a declaration of approval to a disposition under a properly made will, according to a jurist, is that the heir donates his share to the person taking under the disposition. See page 261 *Minhaj et Talibin*. In the case here I can see no evidence that any beneficiary present declared his approval to the plaintiff taking the whole of the estate. Considering the circumstances in which the document was made, I am convinced that the plaintiff was taking advantage of the situation by exerting his status as the eldest son in the family and that he knew no one would dare to challenge him by reason of his status, and particularly at that time — when the others were concerned with the deceased who was on the throes of death, all he seemed to care was to get the deceased's estate to himself by any means. In these circumstances if interpretation of the silence of the relatives is required, I would construe it as contempt of the plaintiff's conduct.

The evidence before me overwhelmingly shows that the deceased had no capacity to make the 1968 will as he was unconscious; I find that this will was the work of the plaintiff with, I regret to say, the active assistance of the lawyer, Encik Sim. The subsequent conduct of Encik Sim supports this. If in fact Encik Sim had received instructions from the deceased to draft the will, as Encik Sim claims, then Encik Sim would have sought direction from the deceased as to what was to be done with the executed document. But contrary to usual practice Encik Sim kept the will without any direction from the deceased or any one present, and produced it when the plaintiff asked for it after the death of the deceased. The fact that Encik Sim did not seek direction, in my view, only goes to add weight to the evidence that the deceased was unconscious and could not speak at the time.

The Wills Ordinance, 1959 does not apply to Muslims. See section 2(2). But Muslim Law is the same as the statutory provision in section 3 in requiring that a person must be of sound mind when making a will. Islamic Law in Malaya at page 263 reads:

"The capacity to make a will is accorded by law to everyone without distinction of sex, who is adult, sane and free... Such capacity is not possessed by a madman, by a person in faint...."

I pronounce that the 1968 will is invalid by reason of the deceased being in a coma when it was made. As regards the 1961 will, I can see no dispute at all that the deceased made it. It merely in effect names the plaintiff and the defendant as executors and trustees and directs them to distribute the estate according to Muslim Law. The plaintiff adduces no evidence that the deceased did not know and approve the contents of this will as averred in the defence to the counterclaim. I pronounce for this will and admit it to probate.

Before I leave there are two matters which require attention. Although this pains me, I feel that I would be failing in my duty if I did not do what has to be done.

(1) The evidence so far adduced in this case shows that there was a commission of an offence connected with forgery considering my finding that the "1968 will" is in effect a false document. See section 464 third explanation of the Penal Code. But as far as I can see there should be further investigation before any criminal action can be commenced. I direct the Senior Assistant Registrar to send a copy of the proceedings in this case to the Public Prosecutor for his consideration and, if necessary, to direct further investigation and to issue a sanction to prosecute under section 129 of the Criminal Procedure Code.

(2) The evidence in my opinion also shows that in three or four respects Encik Sim did not conduct himself in a professional way. I also direct the Senior Assistant Registrar to send a copy of the proceedings to the Bar Committee for the committee to consider whether disciplinary action should be taken against Encik Sim for professional misconduct in his handling of matters leading to and after the making of the "1968 will".

The plaintiff's claim is dismissed with costs. The defendant's counterclaim is allowed with costs. All costs to be paid by the plaintiff on higher scale.

Claim dismissed.

Counterclaim allowed.

Solicitors: *C. H. Lim & Hooi; Abdullah A. Rahman & Co.*